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IN THE

Supreme Court of the United States

October Term, 1970

No. 5714

LINDA JENNESS, et al.,

Appellants,

v.

BEN W. FORTSON, JR., Secretary of State of the State of Georgia,

Appellee.

Appeal from the United States District Court
For the Northern District of Georgia

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

QUESTIONS PRESENTED

1. Does the Equal Protection Clause prohibit the people of a state from providing a nomination petition as an alternative to a political primary as a means of obtaining a place on the general election ballot?

2. Does the right to freedom of association require a state to print on the general election ballot the name of every person who wishes to see his name on the ballot?

STATEMENT

This case is a direct appeal from the final decision of a three-judge district court. While the District Court removed the Georgia Election Code's qualifying fee requirement upon a candidate's showing of inability to pay due to poverty, the Court upheld the nomination petition requirement against the constitutional attacks, repeated in the Brief for the Appellants (hereafter, for simplicity, "Mrs. Jenness").

Generally, a candidate wishing to appear on the general election ballot has the choice of either seeking a political party's nomination in a primary contest or filing a nomination petition. Ga. Code § 34-1001. All candidates must state their choice at the same time, this year on June 10, 1970. Ga. Code §§ 34-1002(b), 34-1005.

The nomination petition must contain at least 5% of the number of electors eligible to vote in the last election for the office the candidate is seeking. Ga. Code § 34-1010(b). This provision has been part of the Election Code since its adoption in 1964.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE DOES NOT PROHIBIT THE PEOPLE OF A STATE FROM PROVIDING A NOMINATION PETITION AS AN ALTERNATIVE TO A POLITICAL PRIMARY AS A MEANS OF OBTAINING A PLACE ON THE GENERAL ELECTION BALLOT.

Mrs. Jenness argues that requiring a nomination petition from a non-party candidate is a violation of the

Equal Protection Clause. This view is apparently fostered by her belief that somehow a candidate in a political party primary has an easier time of it than a candidate gathering a nomination petition.

Yet, an examination of the paths to the general election ballot in Georgia reveals that the paths are quite equal in their degree of difficulty. A candidate on either path must pay the same qualifying fee[1] and qualify at the same time.[2] The only significant difference is that one candidate must gather a nomination petition while the other must put together a victory in a political primary.

Apparently, Mrs. Jenness has never been involved in a rough and tumble primary battle. If she had been, she would not pass off victory in a primary so lightly nor would she claim that the imbalance between the two paths is so great as to be a denial of equal protection. A typical candidate in a primary race for Governor must expend great amounts of physical effort, time and financial resources if he wishes to win the nomination and qualify for the general election ballot. The most recent primary battle in Georgia involved a field of 12 candidates, from which only two emerged as candidates able to proceed to the general election. Can anyone really believe that in equal protection terms, one route is easier than the other? In a recent similar case involving an equal protection question between the nomination petition of an independent candidate and the political primary requirement of a party candidate, the First Circuit Court of Appeals upheld the constitutionality of the different paths and, while citing *Williams v. Rhodes*, 393

[1]Ga. Code § 34-1013(a).

[2]Ga. Code §§ 34-1002(b), 34-1005(b).

U.S. 23 (1968), characterized victory in a party primary contest as "often a not inconsiderable undertaking". *Lyons v. Davoren,* 402 F.2d 890, 893 (1st Cir. 1968).

This Court has held that the Equal Protection Clause does not make every minor difference in the application of election laws to different groups a violation of the Constitution. It is a violation only when "invidious distinctions" have been enacted. *Williams v. Rhodes,* 393 U.S. 23 at 30 and 39 (1968).

This case does not involve a statute which is aimed at any racial group or other discrete or insular minority. See *Nixon v. Herndon,* 273 U.S. 536 (1927), *U.S. v. Carolene Products Co.,* 304 U.S. 144, 152, n.4 (1938). Political minority groups have a great tendency to sprout and wither with the rise and decline of new political philosophies. A member of today's dominant party may be tomorrow's dissident. Today's minority platforms can be tomorrow's realities. Hence, there is no discrete political group or minority which can be said to be the target of the statute. Neither is there the slightest hint of any such discrimination in the record of this case.

Indeed, if any political body should obtain the required percentage vote in an election, the body automatically becomes a party[3] and must nominate its candidates in a primary.[4] Further, if any party falls below the required percentage it automatically becomes a body and must follow the petition path.[5] As further proof of Georgia's good faith in this area, the Election Code dispenses with a petition requirement in the case of a non-party

[3]Ga. Code § 34-103(u).

[4]Ga. Code § 34-1004.

[5]Ga. Code §§ 34-103(s), 34-1001.

incumbent seeking to succeed himself.[6] The incumbent can qualify for re-election without offering in any primary or gathering a petition.

Neither does this case involve a statute which denies the right to vote to Mrs. Jenness or her group. See *Carrington v. Rash,* 380 U.S. 89 (1965); *Kramer v. Union School District,* 395 U.S. 621 (1969); *City of Phoenix v. Kolodziejski,* 399 U.S. 204 (1970). On the contrary, Georgia allows an elector to sign as many nomination petitions as he chooses and still vote in the primary of his choice. In equal protection terms, it could easily be argued that this arrangement debases the vote of the loyal party member who only votes in the primary since the primary candidate does not need any certain number of votes to win, so long as he receives a majority.

Unquestionably, in *Williams,* there was a wide disparity in the way Ohio treated the two paths to the general election ballot. However, as Georgia has tried to point out above, Georgia has no such disparity of treatment. Unless this Court decides that it is a violation of equal protection *per se* to use the petition method as an alternative to the primary under any circumstances, Georgia believes that its law, taken as a whole, is one of the fairest in the land.

The point has been raised that Georgia's 5% petition requirement is not the lowest in the United States. However, we believe that a comparison of petition requirements based only on the number of signatures needed is extremely misleading unless the entire election scheme

[6]Ga. Code § 34-1002(c)(iv).

is considered. When this is done, it becomes apparent that the disabilities and requirements imposed by the various states on a nomination petition greatly increase the comparative burden on non-party candidates.

For example, California requires that both the candidate and every signer of a nomination petition must swear they did not vote at the preceding primary in which any candidates were nominated for the office sought by the candidate circulating the petition.[7] California also prohibits a candidate from being a registered member of any other political party within a year of the primary.[8]

Georgia imposes no such restrictions.

Colorado requires each signer of a nomination petition to swear that he has not voted at any primary held by any political party to nominate a candidate for the office in question and then the signer must get his signature individually notarized by a notary who can not be the candidate.[9]

Georgia has no such restrictions.

In Louisiana, a voter may only sign one nomination petition for each office and the voter may not be registered as affiliated with any political party.[10]

Georgia has no such restrictions.

In New York, the signer of a nomination petition must state that he intends to support the candidate at the election. Further, a signer is ineligible if he was not registered at the time of the *last* general election or if he voted at

[7]California Elections Code § 6830(c).

[8]California Elections Code § 6830(d).

[9]Col. Rev. Stats. 49-7-1(4), as amended by laws 1967, p. 679.

[10]L.S.A.-R.S. 18: 624(A, B).

any primary where a candidate was nominated for the same office as the petition seeks. Also, a person is ineligible to sign a petition if he has signed any other petition nominating the same or different person for the same office.[11]

Georgia has no such restrictions.

In Rhode Island any voter signing a nomination petition is *thereafter disqualified* from participating in the primary of any political party for the next 26 months. Also, an elector may only sign one petition for each office.[12]

Georgia has no such restrictions.

We emphasize that the above examples are not the result of any exhaustive search of state laws but rather a random sampling of these laws. We cannot say what other unique conditions or disabilities might be uncovered by further search. We can say that Georgia imposes no such burdens on any elector signing nomination petitions.

Finally, Georgia's law does not *bar* a non-party candidate from appearing on the general election ballot. It merely provides an alternative path to the primary path. We do not understand Mrs. Jenness to argue that it would be a denial of equal protection if non-party candidates were required to also be nominated in a primary. Her equal protection complaint is bottomed on an assumed inequality between the two paths. We hope the preceding discussion has shown why the equal protection challenge should not prevail.

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[11]N.Y. Election Law § 138(2, 6).

[12]Rhode Island Laws § 17-16-8.

II. THE RIGHT TO FREEDOM OF ASSOCIATION DOES NOT REQUIRE A STATE TO PRINT ON THE GENERAL ELECTION BALLOT THE NAME OF EVERY PERSON WHO WISHES TO SEE HIS NAME ON THE BALLOT.

Mrs. Jenness argues that because it is impossible for her to fulfill the nomination petition requirement for Governor to appear on the general election ballot, the requirement violates her right to freedom of association and the rights of those in her situation.[13]

Nowhere in the record of this case is there any hint that Mrs. Jenness has ever tried to secure the required petition. Her candor compels her to admit she cannot meet the petition requirement[14] — it stops short of any showing that she or anyone on her behalf has ever tried. She complains because it is necessary for her to expend some effort prior to obtaining a printed spot on the general election ballot. We do not understand the thrust of her argument to be that Georgia's requirement is too high, but rather she argues that any petition requirement is violative of her right to freedom of association.

To date, this Court has not ruled that a State must print on the general election ballot the name of every person who wishes to see his (or her) name on the ballot.

[13]It is unfortunate that Mrs. Jenness chose the high office of Governor as her goal. If her purpose was only to appear on the general election ballot, she would have been well advised to select a lesser office with a smaller total signature requirement. Also, as a State House Representative for example, she would have a forum for the expression of her views, a greater likelihood of success in the election and a more solid base from which to proceed in the political arena, if she so desired.

[14]Brief of Appellant, 8, n.5.

Mrs. Jenness claims that Georgia can advance no other state interest in support of this statute except those advanced by Ohio in *Williams*. Since this Court rejected those interests in *Williams*, Mrs. Jenness concludes that they may not be relied on by any state in upholding the state's election laws.

We do not intend to burden this Court with a repetitious listing of all the possible state interests in election legislation. This Court's expertise and experience in the area exceed any small effort we could muster. Georgia does believe that while these interests may not have been sufficient to overcome the imbalance in Ohio's laws, the same interests are here legitimate in light of Georgia's evenly-balanced statutory scheme. (See I, *supra.*) Must these reasonable state interests be relegated to the scrap heap and never again be relied on in drafting legislation because they once fell short in a case completely different from the case presently before this Court? We hope not.

It is not the purpose of Georgia's petition requirement to bar or prevent Mrs. Jenness from exercising her freedom of association rights. She may meet with any others wherever and whenever she chooses; there is no prior restraint on her right to speak or assemble. She may compete in the market place of ideas through the written media or through television and radio.[15] There is no stigma or penalty attached to any exercise of her rights under the law. *Griswold v. Connecticut*, 381 U.S. 479 (1965). The only possible burden occurs when Mrs.

[15]While some argue that a write-in candidacy is not a complete answer to this problem, at least the FCC has ruled that write-in candidates must be regarded as official candidates and treated as such, including the right to equal time.

Jenness wishes to have her name printed on the general election ballot for governor. In that instance, she and her supporters are asked to expend some effort to gather a 5% nomination petition.

Mrs. Jenness argues that by requiring the signer of a nomination petition to identify himself, there is a violation of the traditional secret ballot and a "chilling effect" which raises First Amendment problems under *Dombrowski v. Pfister,* 380 U.S. 479 (1965). However, nothing in Georgia law requires a statement or insinuation that the signer of a petition agrees to support the candidate. In Georgia, as in most states, an elector can be questioned on his identity by election officials at the proper time whether or not he signs a nominational petition. To the same extent, the secrecy of the ballot is lessened in a primary when an elector must choose and openly acknowledge in which party primary he wishes to vote. No one argues that this has any "chilling effect".

Georgia doubts that there is any real impingement on Mrs. Jenness' constitutional right to freedom of association because of the petition requirement. However, if there is a remote impingement, the necessary interests of the 49 states which depend on these requirements would more than justify it. We believe the people may make this type of reasonable limitation on access to the general election ballot if the limitation is specific in its detail, not overbroad in its reach and applied equally to everyone. *Cox v. Louisiana,* 379 U.S. 536 (1965); *Jeanette Rankin Brigade v. Chief of Capitol Police,* 278 F.Supp. 233 (D.D.C. 1968); *In Re Moskowitz,* 25 N.Y. 2d 933, 252 N.E.2d 629 (1969); *appeal dismissed for*

want of substantial federal question; 396 U.S. 373 (1970).

CONCLUSION

For the reasons stated, Georgia respectfully urges this Court to affirm the judgment of the three-judge court below and allow the 49 states to continue the use of nomination petitions in the election process.

Respectfully submitted,

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